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**STATE OF ILLINOIS
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COMMERCE COMMISSION

Nov 28 10 51 AM '01

COMMONWEALTH EDISON COMPANY)

CHIEF CLERK'S OFFICE

Petition for approval of delivery services tariffs)
and tariff revisions and of residential delivery)
services implementation plan and for approval)
of certain other amendments and additions)
to its rates, terms, and conditions.)

ICC Docket No. 01-0423

**PETITION FOR INTERLOCUTORY REVIEW
OF THE COOK COUNTY STATE'S ATTORNEY'S OFFICE**

The Cook County State's Attorney's Office, by Richard A. Devine, Cook County State's Attorney, ("CCSAO"), pursuant to Section 200.520 of the Rules of Practice of the Illinois Commerce Commission ("the Commission"), 83 Ill.Admin. Code Section 200.520 submits this Petition for Interlocutory Review of the decision of the Administrative Law Judges ("ALJs") to deny the Government and Consumer Intervenors' ("GCI's") Motion to Admit the Vantage and Liberty Reports into the record on November 15, 2001. In support said Petition, CCSAO states as follows:

BACKGROUND

In August 1999, the Commission determined that an investigation of ComEd's transmission and distribution lines and systems was necessary due to the outages which occurred in ComEd's service territory beginning July 30, 1999. This investigation was to be conducted in three stages. Stage I involved an investigation of ComEd's service interruptions beginning July 30, 1999 through August 13, 1999. Stage II and III involved investigations of ComEd's distribution and transmission system, respectively. Findings

derived from the final investigative reports were to provide specific and detailed recommendations upon which ComEd and the Commission could take action to reduce the future likelihood of outages and/or reduce the impact of such outages on affected customers, and recommend a schedule for accomplishing the recommendations. (Exhibit A). Vantage Consulting, Inc. conducted the Stage I investigation ("Vantage Report"). Liberty Consulting Group conducted the Stage II and III investigations ("Liberty Report").

The Vantage and Liberty reports are relevant in this proceeding. Their relevance is revealed in ComEd's direct testimony. Arlene Juracek states, "As our revenue requirement witnesses will testify, ComEd has not inflated this revenue requirement with additional costs to fix past errors." ComEd Ex. 1.0 at 19. ComEd's "past errors" caused the Commission to invoke its authority to investigate and review the reliability of ComEd's transmission and distribution system. Therefore, the Commission and the parties in this proceeding have the right to probe Ms. Juracek's statement, which includes analyzing the Vantage and Liberty reports that resulted from ComEd's "past errors".

As GCI witness, Edward Bodmer testified, ComEd is requesting the Commission and the parties to "accept a rather extreme position (that millions of dollars spent on distribution upgrades would have been the same had the past acknowledged problems not occurred) without any objective analysis. Edison's position comes very close to arguing that allowed test year costs of service cannot be affected by prior management actions, even if they were imprudent." GCI Ex. 4.0 at 7. The Vantage and Liberty reports are the only objective evidence of ComEd's "past errors." Allowing the Vantage and Liberty reports into the record will permit the Commission and the parties to perform a necessary

evaluation. We will no longer have to accept on faith ComEd's assertion that it has not inflated its revenue requirement with additional costs to fix "past errors."

Accordingly, on November 6, 2001, GCI moved for the admission of the Vantage and Liberty reports into record of this proceeding. ComEd responded alleging that the reports were improper evidence. GCI replied that the reports were not only relevant but also resulted from an investigation pursuant to the Commission's authority. Moreover, the reports were conducted by experts-which ComEd did not dispute-and were trustworthy. GCI Reply at 3. On November 15, 2001, the ALJs denied GCI's motion.

ARGUMENT

1. The ALJs erred in denying relevant evidence from consideration in this proceeding.

Even ComEd admits that ratepayers should not be saddled with the costs of its past reliability failures. ComEd Ex. 1.0 at 19. Yet, ComEd refuses to allow any objective evidence in this proceeding so that a determination of what costs (if any) should be disallowed as imprudent or unreasonable. ComEd Response at 8. As GCI witness Bodmer testified,

...The question for the Commission is not whether fixing an obvious problem is prudent. It is whether any of the costs of fixing the problem should be disallowed because the costs were caused by prior imprudent actions....In other words, even if actions made by current management to fix problems are exemplary, a rate base adjustment may still be appropriate where the proposed rate base or expense level is more than it would have been if past management actions had been prudent. GC Ex. 4.0 at 9,11.

Nevertheless, ComEd merely justifies its costs with a number of statements about its procedures and witnesses' opinions that the procedures worked. The Vantage and Liberty reports are the only objective data or analysis that assists the Commission in determining whether ComEd has spent more than it would have absent any utility actions

of questionable prudence. Under Illinois law, the Vantage and Liberty reports clearly meet relevancy standards. *People v. Henderson*, 171 Ill.2d 124, 156-157, 662 N.E.2d 1287 (1996). (“A threshold requirement for the admission of expert testimony is that the proffered testimony be of assistance to the court or jury.”)

2. The ALJs erred in denying admissible relevant evidence into this proceeding.

Not only are the Vantage and Liberty reports relevant, but also admissible. The Vantage and Liberty reports fall within the hearsay exception. The reports are public records. GCI Motion at 3. Illinois courts have adopted the view that public records that contain an opinion or conclusion do not necessarily have to be excluded from the public record hearsay exception. Illinois law provides that public records of expert opinions or conclusions are admissible:

The fire incident report contains the opinion that the “ignition factor” of the fire was “electrical” and that the equipment involved in ignition was “fixed wiring.” We find that this report clearly contains an opinion as to the cause of the fire and, as such, was not admissible under the public records exception to the hearsay rule unless the author of the report, Leland Pendergrass, was qualified as an expert to give such an opinion.

Bloomgren v. Fire Insurance Exchange, 162 Ill.App.3d 594, 599; 517 N.E.2d 290 (3d Dist. 1987).

Experts clearly performed the Vantage and Liberty reports. The request for a proposal required that the selected vendor *have and demonstrate* the education, experience and technical ability to perform the investigation. *See* attached Exhibit A at 4. In addition, the Commission conducted the investigations because they were concerned that ComEd’s distribution and transmission systems were not capable of providing reliable electric service and therefore, could place the health, safety and economic well being of Illinois citizens at risk. Exhibit A at 2. Accordingly, the Commission would not

have selected Vantage and Liberty unless they had sufficient expertise. It is also important to note that ComEd does not even dispute that experts performed the Vantage and Liberty reports. ComEd Response at 1-10. Consequently, the Vantage and Liberty reports fall squarely within public record exception to the hearsay rule according to state law.

Moreover, even under federal law, the reports are admissible. Under the Federal Rule of Evidence 803, public records are not excluded by the hearsay rule in civil actions and proceedings if the factual findings result from an investigation made pursuant to authority granted by law, unless the sources of the information or other circumstances indicate lack of trustworthiness.” Fed. R. Evid. 803(8)(C). The Supreme Court also has ruled that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 102 L.Ed.2d 445, 109 S.Ct. 439 (1988). The Supreme Court stated,

Rather than requiring that we draw some inevitably arbitrary line between the various shades of fact/opinion that invariably will be present in investigatory reports, we believe the Rule instructs us—as its plain language states—admit ‘reports ...setting forth..factual findings.’ The Rule’s limitations and safeguards lie elsewhere: First, the requirement that reports contain factual findings bars the admission of statements not based on factual investigation. Second the trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted. *Beech Aircraft*, 102 L.Ed. 2d at 449-450. See also, *United States v. Romo*, 914 F.2d 889, 896 (7th Cir. 1990); *Fujisawa Pharmaceutical Co. v. Kapoor*, No. 92 C 5508, 1999 U.S. District Lexis 11381(7th Cir.1999).

The Vantage and Liberty reports clearly resulted from an investigation pursuant to the Commission’s authority and are trustworthy. GCI Motion at 2-3. Accordingly, even pursuant to federal law, the reports are admissible.

3. The ALJs erred by denying ComEd an opportunity to cross-examine the reports within the context of this proceeding.

Although GCI maintains that ComEd had sufficient opportunity to rebut the reports when they were presented, the ALJs could have allowed ComEd an opportunity to cross-examine a witness of the Vantage and Liberty reports. GCI Reply at 3-4. ComEd complains that allowing the Vantage and Liberty reports in this proceeding without an opportunity to cross-examine is prejudicial. Assuming for the sake of argument that ComEd is correct, such an examination could have been conducted. Since the reports were done within the past two years, the Commission can request that a witness or witnesses who can explain and support the investigation findings and recommendations be made available for cross-examination in this proceeding. Exhibit A at 3. Therefore, the ALJs could have easily eradicated ComEd's concern about the need to cross-examine. The ALJs erred by not doing so.

4. The ALJs erred by not taking administrative notice of the Vantage and Liberty reports.

If the Commission declined to admit the Vantage and Liberty reports as public records, the Commission could have taken administrative notice of the reports. Section 200.640 of the of the Commission's rules allows the Commission to take administrative notice of matters generally recognized as scientific or technical facts within the specialized knowledge of the Commission. 83 Ill. Adm. 200.640(a)(6). As previously shown, the reports are relevant to this proceeding. Therefore, in order for the Commission to have a complete record to determine the appropriate revenue requirement for its delivery services, the Commission should at the least take administrative notice of the Vantage and Liberty reports. ComEd's argument concerning the Commission taking

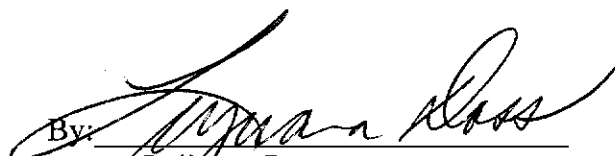
administrative notice of the Vantage and Liberty reports has no merit. ComEd Response at 9. ComEd cites no past Commission decision that supports such a narrow view of Section 200.640(a)(6) of the Commission's rules. 83 Ill. Adm. Code 200.640(a)(6). However, even under ComEd's narrow interpretation, the Vantage and Liberty reports would still be admissible. First, the reports contain specific findings regarding ComEd's "past failures" relative to the time they occurred. Second, these reports were done pursuant to the authority and direction of the Commission. Third, no other party had authority to conduct such an investigation except the Commission. In sum, the Commission has the authority and ample reasons to take administrative notice of the Liberty and Vantage reports.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in GCI's Motion and its Reply, CCSAO respectfully requests this Commission to grant the motion to admit the Vantage and Liberty Reports into the record of this proceeding.

Respectfully Submitted,

PEOPLE OF COOK COUNTY
RICHARD A. DEVINE
State's Attorney of Cook County

By: 
Leijana Doss
Assistant State's Attorney

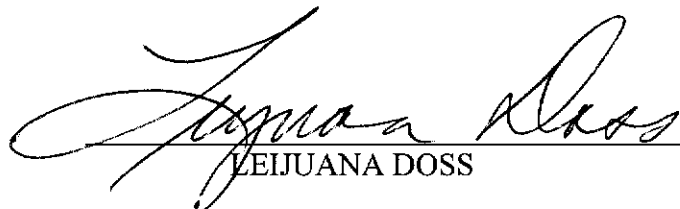
November 28, 2001

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

VERIFICATION

NOW COMES LEIJUANA DOSS, who, after first being sworn, deposes and says:

1. That she is an Assistant State's Attorney in Cook County assigned to represent the People of Cook County in any proceedings in connection with the attached PETITION FOR INTERLOCUTORY REVIEW; and
2. That she has read the attached PETITION FOR INTERLOCUTORY REVIEW and that the facts alleged therein are true and correct to the best of her knowledge and belief.


LEIJUANA DOSS

SUBSCRIBED AND SWORN to
before me this 28th day
of November 2001.


Notary Public



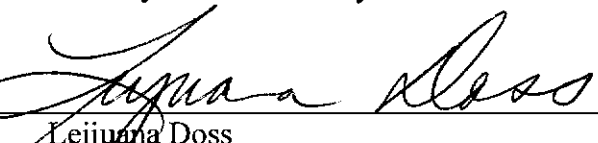
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Commonwealth Edison Company)	
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NOTICE OF FILING

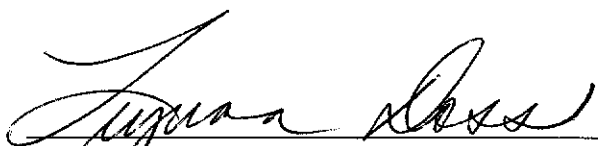
PLEASE TAKE NOTICE that on this date, November 28, 2001, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Petition for Interlocutory Review of the Cook County State's Attorney's Office in the above-captioned docketed.

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State's Attorney of Cook County

By: 
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CERTIFICATE OF SERVICE

I, **LEIJUANA DOSS**, hereby certify that a copy of the enclosed Petition for Interlocutory Review of the Cook County State's Attorney's Office was served on all parties on the attached list on the 28th day of November, 2001 by hand delivery or U.S. first class mail prepaid.


Leijuana Doss
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